

APPEAL NO. 052108
FILED OCTOBER 25, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 16, 2005. The hearing officer resolved the disputed issue by deciding that the first certification of maximum medical improvement (MMI) and the assigned impairment rating (IR) from (Dr. W) dated September 16, 2004, became final under Section 408.123. The appellant (carrier) appealed, contending that the hearing officer's determination is wrong as a matter of law because the only way a first certification of MMI and IR can be overturned is by final decision of the Texas Department of Insurance, Division of Workers' Compensation (Division) or a Court. The respondent (claimant) responded, urging affirmance. The carrier subsequently filed a response to the claimant's response. There being no provision for a reply to a response to a request for review the additional filing will not be considered. See Sections 410.202 and 410.203(a).

DECISION

Reversed and rendered.

The parties stipulated that on _____, the claimant sustained a compensable injury. It was undisputed that the first certification of IR and MMI was from (Dr. V) on January 7, 2004, and that this certification was timely disputed in accordance with Section 408.123. There was no contention that the certification of Dr. V was not a valid certification nor is there any indication on the face of Dr. V's Report of Medical Evaluation (TWCC-69) that it is not a valid certification. (Dr. C) was appointed as a designated doctor and examined the claimant on March 4, 2004, and certified that the claimant had not yet reached MMI. Dr. W was a subsequently appointed designated doctor and he examined the claimant on September 16, 2004, and certified that the claimant reached MMI on that date with a 24% IR.

The hearing officer found that Dr. C's TWCC-69 and opinion regarding MMI was not disputed and became final and that Dr. V's certification was overturned by the certification of Dr. C that the claimant had not yet reached MMI. Additionally, the hearing officer found that Dr. W's certification was the first valid certification issued subsequent to the overturning of Dr. V's first certification and the carrier did not dispute Dr. W's certification within 90 days. The hearing officer then concluded that the first certification of Dr. W dated September 16, 2004, became final under Section 408.123.

Section 408.123(d) provides that except as provided in subsections (e), (f), and (g), the first valid certification of MMI and the first valid assignment of IR to an employee are final if the certification of MMI and/or the assigned IR is not disputed within 90 days after written notification of the MMI and/or assignment of IR is provided to the claimant and the carrier by verifiable means. 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12)

provides that the certifications and assignments that may become final are: (1) the first valid certification of MMI and/or IR assigned or determination of no impairment; (2) the first valid assignment of IR after the expiration of 104 weeks from the date income benefits begin to accrue or the expiration date of any extension under Section 408.104, if the employee has not been certified as having reached MMI; or (3) “the first valid subsequent certification of MMI and/or assignment of an IR or determination of no impairment received after the date a certification of MMI and/or assignment of IR or determination of no impairment is overturned, modified, or withdrawn by agreement of the parties or by a final decision of the commission or a court.” The preamble to Rule 130.12 provides examples of what does and does not come within the meaning of Rule 130.12(a)(3) stating in part, “[i]n the event the first MMI/IR is the only certification and it is rescinded, or in the event an agreement or commission decision and order is entered but another certification on record is not selected, this would fall within the scope of this subsection. In these situations, the next certification received after this event would become the first certification that may become final if not disputed as provided in this section and by statute.” For a subsequent MMI/IR certification to become final, it must be made after a decision that modifies, overturns, or withdraws a first MMI/IR certification that became final.

In the instant case, the first valid certification of MMI/IR was timely disputed. The fact that the first designated doctor, (Dr. C), opined that the claimant did not reach MMI did not in and of itself overturn the rating of Dr. V, which was the first valid certification of MMI/IR. There was no evidence that the Division or a Court had made a determination regarding the claimant’s MMI/IR or that the certification of Dr. V had been rescinded. The hearing officer’s finding that Dr. V’s first certification was overturned by the certification of Dr. C that the claimant had not reached MMI is incorrect as a matter of law. We reverse the determination that the first certification of MMI and IR from Dr. W on September 16, 2004, became final under Section 408.123 and render a determination that the first certification of MMI and IR from Dr. W on September 16, 2004, did not become final under Section 408.123.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

**JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
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For service by mail the address is:

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AUSTIN, TEXAS 78711-3777.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge